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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 SOCORRO CALDERON,

11 Plaintiff,

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13 v.

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15  
16 TARGET CORPORATION,

17 Defendant.

NO. 12-CV-1781-MMA(PCL)

**ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT;**

[Doc. No. 20]

**DENYING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT;**

[Doc. No. 22]

**GRANTING DEFENDANT'S  
REQUEST FOR REASONABLE  
EXPENSES PURSUANT TO  
FED. R. CIV. P. 16(f)(2)**

19  
20 This action arises out of events occurring at a Target store in El Centro,  
21 California. Plaintiff Socorro Calderon ("Plaintiff") fell from a stool while shopping  
22 at the store, allegedly suffering injuries. Plaintiff filed suit against Defendant Target  
23 Corporation ("Target") for negligence and premises liability. Target moves for  
24 summary judgment in its favor as to both causes of action. Plaintiff does not oppose  
25 Target's motion. She concedes her claims are not viable and instead moves for leave  
26 to file an amended complaint substituting new causes of action. Target opposes  
27 Plaintiff's motion to amend and requests an award of reasonable expenses incurred  
28 in opposing the motion.

1 For the reasons set forth below, the Court **GRANTS** Target's summary  
2 judgment motion, **DENIES** Plaintiff's motion for leave to file an amended  
3 complaint, and **GRANTS** Target's request for reasonable expenses pursuant to  
4 Federal Rule of Civil Procedure 16(f)(2).

### 5 I. BACKGROUND

6 On January 28, 2012, Plaintiff and her friend arrived at the Target store  
7 located at 2295 North Imperial Avenue in El Centro, California.<sup>1</sup> Plaintiff went  
8 directly towards the back of the store to shop for a stool. Plaintiff found a stool of  
9 interest in the mini-seasonal/lawn and patio section of the store. The stool was on  
10 display on a middle shelf, outside a box, and was completely open and assembled.  
11 Plaintiff decided to test the stool before she purchased it. When she first saw the  
12 stool on the shelf, she did not see anything visibly wrong with it, and it appeared to  
13 be in working condition. Additionally, she did not observe any scratches, tears, or  
14 missing pieces. She used both hands to take the stool off the shelf and put it on the  
15 ground. At that point, she did not feel anything on the stool that indicated it was  
16 broken or otherwise defective. When she set the stool on the ground, she placed her  
17 hands on the top and applied some pressure to it before sitting. She did this to  
18 assure herself that the stool was safe to sit on.

19 After Plaintiff inspected the stool, she sat on it. As she sat, the stool collapsed  
20 with her on top of it, causing her to fall straight down onto her buttocks and hit the  
21 back of her head on the shelf behind her. The allegedly defective stool was  
22 completely flattened on the ground, but it was still in one piece. No screws, pieces  
23 of plastic, latches, or any other component parts had fallen off. Plaintiff stood up,  
24 picked up the stool, and put it back on the shelf. She did not observe any broken  
25 pieces anywhere in the surrounding area.

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27 <sup>1</sup> The Background section of this Order largely tracks Defendant's Summary  
28 of Undisputed Facts, which is supported by the record and has not been disputed or  
objected to by Plaintiff. *See* Doc. No. 20-5.

1 Plaintiff walked toward the front of the store, found a Target employee, told  
2 him she had fallen due to the collapse of a green stool while she was sitting on it,  
3 and pointed to the general area where she fell. The employee instructed Plaintiff to  
4 walk to the front of the store and report the incident to Guest Services, which she  
5 did. The Target Team Leader on Duty, Candice Bixler, attended to Plaintiff. Ms.  
6 Bixler discussed the incident with Plaintiff and filled out a Target Guest Incident  
7 Report with her. Plaintiff did not ask anyone to accompany her to report the  
8 incident, nor did she request anyone stay behind with the stool. After completing the  
9 Target Guest Incident Report, Plaintiff declined any medical care and left the store.

10 Immediately after Plaintiff reported the incident, Ms. Bixler conducted an  
11 inspection of the mini-seasonal/patio section and surrounding areas where the  
12 incident occurred. Ms. Bixler walked through the entire mini-seasonal area, aisle by  
13 aisle, looking for a broken stool or chair. She looked on each of the shelves and  
14 inspected one of the end-caps stocked with green chairs to see if a team member  
15 possibly folded it and put it back up. She looked at the garden area outside the store,  
16 the back room, and the compactor section where a broken stool could be deposited.  
17 She followed Target protocol requiring the Leader on Duty to physically feel the  
18 ground throughout the area and see if there was anything that could have made the  
19 floor slippery. Ms. Bixler touched the floor of every aisle in the mini-seasonal  
20 section to feel for a potential slippery or dangerous condition on the floor that could  
21 have caused the alleged incident, but found none.

22 Ms. Bixler then checked with the Guest Service Team Leader at the front of  
23 the store where stray merchandise is placed, but there was no sign of a green chair or  
24 stool. She coordinated with the asset protection team to determine whether there  
25 was any video surveillance of the incident, but there was none. Ms. Bixler looked in  
26 areas where someone might hide or place a broken stool on the floor area but out of  
27 normal sight. She did not locate or identify any broken green stool anywhere in the  
28 store. She thereafter interviewed every Target employee on duty to inquire whether

1 anybody had helped a customer in the mini-seasonal area, had seen the incident,  
2 picked up a defective or broken stool, or seen anything out of the ordinary. All  
3 reports were negative.

4       The El Centro Target requires the designated Leader on Duty to conduct a  
5 safety walk of the entire store and look for any hazards or debris and attend to guests  
6 every hour. On the day of the incident, Ms. Bixler was the Leader on Duty working  
7 on the sales floor all day. She had been through the mini-seasonal area several times  
8 during the day, and she did not notice a dangerous condition or the defective stool.  
9 In fact, Ms. Bixler walked through the mini-seasonal area within 30 minutes of the  
10 incident, and she did not notice, see, or identify any broken or defective stool. No  
11 one had reported a broken or defective stool before the incident.

12       On June 1, 2012, Plaintiff initiated this suit against Target in state court,  
13 seeking an unspecified amount of economic and noneconomic damages for general  
14 negligence and premises liability. Thereafter, Target discovered that Plaintiff  
15 estimated her special damages to be in excess of \$100,000. Target timely removed  
16 the action. *See Notice of Removal*, Doc. No. 1. On July 1, 2013, Target filed a  
17 motion for summary judgment in its favor as to both of Plaintiff's claims. *See* Doc.  
18 No. 20. The deadline to complete fact discovery expired on July 5, 2013. *See*  
19 *Scheduling Order*, Doc. No. 11. Target argues that after conducting all fact  
20 discovery, including the depositions of Plaintiff and multiple Target employees,  
21 there is no evidence to show Target had actual or constructive knowledge of a  
22 "dangerous condition" created by the stool. Target asserts that Plaintiff's claims fail  
23 on this basis.

24       On July 17, 2013, Plaintiff filed a Notice of Non-Opposition to Target's  
25 motion for summary judgment contemporaneously with a motion requesting leave to  
26 file an amended complaint. *See* Doc. Nos. 21, 22, 25. Plaintiff allows that her  
27 claims for negligence and premises liability fail based on the lack of any evidence to  
28 show that Target's employees had actual or constructive knowledge of a dangerous

1 condition in the store. However, Plaintiff urges the Court not to dismiss the action.  
2 Plaintiff seeks leave to file an amended complaint to allege causes of action for strict  
3 products liability and breach of implied warranty arising out of the same incident.  
4 Target opposes Plaintiff's motion, arguing that amendment is procedurally improper  
5 and substantively futile. *See* Doc. No. 29. Target requests dismissal of this action  
6 with prejudice.

## 7 **II. DISCUSSION**

### 8 **A. Target's Motion for Summary Judgment**

#### 9 *1. Legal Standard*

10 A court must grant summary judgment if the pleadings and supporting  
11 documents, viewed in the light most favorable to the non-moving party, "show that  
12 there is no genuine issue as to any material fact and that the movant is entitled to  
13 judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v.*  
14 *Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of  
15 presenting the basis for its motion and identifying those portions of the record,  
16 together with affidavits, which it believes demonstrate the absence of a genuine  
17 issue of material fact. *Celotex Corp.*, 477 U.S. at 323. If the moving party meets its  
18 initial responsibility, the burden then shifts to the opposing party who must  
19 demonstrate the existence of a factual dispute. The fact in contention must be  
20 material, *i.e.*, a fact that might affect the outcome of the suit under the governing  
21 law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and the dispute  
22 must be genuine, *i.e.*, the evidence is such that a reasonable jury could return a  
23 verdict for the non-moving party. *Id.* at 250; *see Triton Energy Corp. v. Square D.*  
24 *Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

25 Federal Rule of Civil Procedure 56(e) permits a district court to consider  
26 unopposed facts admitted for purposes of the motion and further allows a court to  
27 "grant summary judgment if the motion and supporting materials—including the  
28 facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P.

1 56(e)(2)-(3). However, summary judgment should not be entered merely because a  
2 party fails to file an opposition, and the Court still must analyze whether the moving  
3 party adequately contends the absence of triable issues of fact. *See Henry v. Gill*  
4 *Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993); *see also Scarff v. Intuit, Inc.*, 318  
5 Fed. App'x 483, 486 (9th Cir. 2008).

6 2. *Analysis*

7 Target moves for summary judgment on the ground that there is no material  
8 dispute of fact as to whether its employees had the requisite notice of a dangerous  
9 condition created by the stool. As mentioned above, Plaintiff does not oppose the  
10 motion and admits that she does not have the evidence necessary to prove this  
11 element of her claims.

12 To prevail on her negligence and premises liability claims at trial, Plaintiff  
13 must establish duty, breach, causation, and damages. *Ortega v. Kmart Corp.*, 36  
14 P.3d 11, 14 (Cal. 2001). In *Howard v. Omni Hotels Mgmt. Corp.*, 203 Cal. App. 4th  
15 403 (2012), the California Court of Appeal set forth the applicable standard for these  
16 related causes of action:

17 Commercial property owners are not insurers of the safety of their patrons,  
18 although they owe the patrons duties to exercise reasonable care in  
19 keeping the premises reasonably safe. To exercise a degree of care that is  
20 commensurate with the risks involved, the owner must make reasonable  
21 inspections of the portions of the premises open to customers. An owner  
22 is liable for harm caused by a dangerous condition, of which the owner  
23 had actual or constructive knowledge. An injured plaintiff has the burden  
24 of showing that the owner had notice of the defect in sufficient time to  
25 correct it, but failed to take reasonable steps to do so. One way to carry  
26 that burden is to raise an inference that the hazardous condition existed  
27 long enough for the owner to have discovered it, if an owner exercising  
28 reasonable care would have learned of it.

24 *Howard*, 203 Cal. App. 4th at 431 (internal citations and quotations omitted).

25 Here, Target adequately establishes the absence of a triable issue of fact  
26 regarding an essential element of Plaintiff's claims. The evidence shows that Target  
27 employees on duty at the time of the incident did not have pre-existing actual or  
28 constructive knowledge of a dangerous condition caused by the stool. Uncontested

1 deposition testimony demonstrates that Target employees exercised ordinary care in  
2 making reasonable inspections of the portions of the store open to customers.  
3 Moreover, Plaintiff's own testimony establishes that any purported defect in the  
4 stool was so well hidden that even she did not discover it upon initial observation  
5 and inspection.

6 Accordingly, Target is entitled to summary judgment in its favor as to  
7 Plaintiff's negligence and premises liability claims.

## 8 **B. Plaintiff's Motion for Leave to Amend**

### 9 *1. Legal Standard*

10 Under Federal Rule of Civil Procedure 15(a), leave to amend a pleading  
11 should be granted as a matter of course, at least until the defendant files a responsive  
12 pleading. After that point, leave to amend should be granted unless amendment  
13 would cause prejudice to the opposing party, is sought in bad faith, is futile, or  
14 creates undue delay. *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1159 (9th  
15 Cir. 1989).

16 Once the court issues a pretrial scheduling order and the deadline for  
17 amending pleadings has passed, Rule 16 provides a more stringent standard of  
18 review. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 737  
19 (9th Cir. 2013), citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609  
20 (9th Cir. 1992). Pursuant to Rule 16(b), "the scheduling order must limit the time to  
21 join other parties, amend the pleadings, complete discovery, and file motions," after  
22 which "the schedule may be modified only for good cause and with the judge's  
23 consent." Fed. R. Civ. P. 16(b)(3),(4).

24 Under Rule 16(b)'s good cause standard, the court's primary focus is on the  
25 movant's diligence in seeking the amendment. *Johnson*, 975 F.2d at 609. "Good  
26 cause" exists if a party can demonstrate that the schedule or deadline to amend the  
27 pleadings "cannot reasonably be met despite the diligence of the party seeking the  
28 extension." *Id.*, citing Fed. R. Civ. P. 16 advisory committee's notes (1983

1 amendment). “[C]arelessness is not compatible with a finding of diligence and  
2 offers no reason for a grant of relief. Although the existence or degree of prejudice  
3 to the party opposing the modification might supply additional reasons to deny a  
4 motion, the focus of the inquiry is upon the moving party’s reasons for seeking  
5 modification.” *Id.* (citations omitted). If the party seeking modification was not  
6 diligent in his or her pretrial preparations, the inquiry should end there and the  
7 measure of relief sought from the Court should not be granted. *Zivkovic v. S. Cal.*  
8 *Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975 F.2d at 609. The  
9 party seeking to continue or extend the deadlines bears the burden of proving good  
10 cause. *See Zivkovic*, 302 F.3d at 1087; *Johnson*, 975 F.2d at 608.

## 11       2.     *Discussion*

12       Plaintiff urges the Court not to dismiss this action prior to granting her leave  
13 to file an amended complaint. Plaintiff seeks to add two new causes of action for  
14 strict products liability and breach of implied warranty. She cites the liberal  
15 standard for amendment under Rule 15(a) and asserts that Target will suffer no  
16 prejudice as a result. Target opposes Plaintiff’s motion, arguing that she fails to  
17 demonstrate good cause for amendment under Rule 16(b). Target also contends that  
18 amendment would be futile and prejudicial to Target. In reply, Plaintiff  
19 acknowledges the applicability of Rule 16(b) and argues that she meets its standard.  
20 She also asserts that amendment would not be futile and Target would suffer only  
21 insubstantial prejudice.<sup>2</sup>

22       As noted above, Rule 16(b) requires a demonstration of “good cause,” which  
23 depends primarily on the diligence of the moving party. *Johnson*, 975 F.2d at 609.  
24 While Plaintiff does not speak directly to the diligence requirement, she argues that  
25 she did not anticipate the need to amend her complaint until March 2013. It was  
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27       <sup>2</sup> Target objects to evidence newly submitted by Plaintiff in support of her  
28 reply brief. *See* Doc. No. 32. This practice is certainly disfavored, however, the  
Court overrules the objection.

1 only then that she discovered she would be unable to prove her negligence and  
2 premises liability claims. Plaintiff's argument is not persuasive. First, Plaintiff fails  
3 to explain why she waited until July 2013 to seek leave to amend, more than five  
4 months after the February 4, 2013 deadline for amendment expired and  
5 approximately four months after she purportedly learned her claims were not viable.

6       Second, and more importantly, Plaintiff was not diligent in seeking  
7 amendment to add the proposed new claims because she was aware of the facts and  
8 theories supporting amendment since the inception of the action. *See In re W. States*  
9 *Wholesale Natural Gas Antitrust Litig.*, 715 F.3d at 737 (affirming denial of leave to  
10 amend). The focus of the diligence requirement is when a party learns facts that  
11 form the basis for the proposed claims – not when the party realizes that the original  
12 claims necessarily will fail due to a lack of proof. Here, discovery did not yield new  
13 evidence or information giving rise to the proposed claims, both of which Plaintiff  
14 could have alleged at the outset of this case. Her failure to bring the proposed  
15 claims in a timely manner is precisely the type of unjustified delay that is  
16 incompatible with a finding of diligence.

17       Although the finding of Plaintiff's lack of diligence ordinarily ends the  
18 inquiry, the Court also finds that in addition to the absence of good cause, allowing  
19 Plaintiff to amend her complaint would be prejudicial to the defense. Target has  
20 litigated this matter for over a year and fact discovery is complete. Target's  
21 discovery to date has been tailored to the claims made in Plaintiff's original  
22 complaint. If a court allows a plaintiff's claims to change very far downstream, the  
23 defendant is almost always prejudiced and that would certainly be the case here.

24       Finally, the Court notes that amendments may not be used as a device to  
25 prevent the efficient resolution of a case. The Ninth Circuit has held that it is not an  
26 abuse of discretion to deny leave to amend to add a claim "raised at the eleventh  
27 hour after discovery was virtually complete and the [defendant's] motion for  
28 summary judgment was pending before the court." *Roberts v. Arizona Board of*

1 *Regents*, 661 F.2d 796, 798 (9th Cir. 1981). The procedural posture considered by  
2 the *Roberts* court mirrors the status of this action. Where, as here, a party proposes  
3 amendments after a summary judgment motion has been filed, the court must look  
4 closely to determine whether the proposed amendments are a tactic to prevent  
5 termination of the case on summary judgment. *Schlacter-Jones v. General*  
6 *Telephone of California*, 936 F.2d 435, 443 (9th Cir. 1990). Target seeks summary  
7 judgment as to all of Plaintiff's current claims. If Plaintiff is allowed to amend her  
8 complaint now, she will have effectively evaded the termination of her lawsuit on  
9 summary judgment. This litigation strategy is questionable at best, and at worst,  
10 suggests dilatory motive.

11 In sum, Plaintiff fails to meet her burden under Rule 16(b) to demonstrate  
12 good cause for amendment of her complaint at this stage of the proceedings.  
13 Furthermore, amendment would be prejudicial to Target.<sup>3</sup> As such, the Court denies  
14 Plaintiff leave to file an amended complaint.

15 **C. Target's Request for Reasonable Expenses**

16 Target requests an award of reasonable expenses, including attorney's fees in  
17 the amount of \$4,345.00, incurred in opposing Plaintiff's untimely motion to amend  
18 her pleadings. Rule 16(f)(1)(C) provides that a court may impose a non-monetary  
19 sanction as a result of the failure of a party or attorney to comply with a scheduling  
20 order. Fed. R. Civ. P. 16(f)(1), citing Fed. R. Civ. P. 37(b)(2)(A)(ii)-(iv). Pursuant  
21 to Rule 16(f)(2), however, "the court *must* order the party, its attorney, or both to  
22 pay the reasonable expenses—including attorney's fees—incurred because of any  
23 noncompliance with this rule, unless the noncompliance was substantially justified  
24 or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2)

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26 <sup>3</sup> Because the Court finds that Plaintiff has not met the stringent standard of  
27 Rule 16(b) and Target would suffer prejudice if the Court allowed Plaintiff to amend  
28 her complaint, the Court does not reach Defendant's alternative arguments that  
Plaintiff's proposed amendments would be futile and amendment is barred by res  
judicata.

1 (emphasis added).

2 Rule 16(f) “was designed not only to insure the expeditious and sound  
3 management of cases for trial, but to deter conduct that unnecessarily consumes ‘the  
4 Court’s time and resources that could have been more productively utilized by  
5 litigants willing to follow the Court’s procedures.’” *Martin Family Trust v.*  
6 *NECO/Nostalgia Enters. Co.*, 186 F.R.D. 601, 603 (E.D. Cal. 1999), quoting *Mulkey*  
7 *v. Meridian Oil, Inc.*, 143 F.R.D. 257, 262 (W.D. Okla. 1992).

8 Here, Plaintiff’s failure to comply with the February 4, 2013 deadline for  
9 filing a motion to amend her complaint was due to her attorney’s lack of diligence  
10 and questionable litigation strategy. “Courts should assign costs ‘where the fault  
11 lies.’” *Sally Beauty Co. v. Beautyco, Inc.*, 372 F.3d 1186, 1189 (10th Cir. 2004),  
12 citing *In re Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc). Therefore,  
13 Plaintiff’s counsel alone should bear the costs, which the Court must award to Target  
14 unless counsel’s noncompliance with the scheduling order deadline was  
15 “substantially justified” or an award of expenses would be “unjust.” Fed. R. Civ. P.  
16 16(f)(2).

17 As explained previously, the Court finds that the failure to file a timely  
18 motion to amend was due to a lack of diligence, so Plaintiff’s counsel’s  
19 noncompliance with the scheduling order is not substantially justified. Nor does  
20 Plaintiff provide any basis for the Court to find an award of expenses unjust. Target  
21 included the request for reasonable expenses in the body of its opposition brief.  
22 Plaintiff had notice of the request and sufficient opportunity to respond in her reply  
23 brief, but did not do so.

24 Target supports its request for reasonable expenses with the Declaration of  
25 lead counsel, Peter J. Schulz. *See* Doc. No. 29-1. Determination of the amount of  
26 attorney’s fees to award typically involves calculating the number of hours  
27 reasonably expended on the litigation multiplied by a reasonable hourly rate.  
28 *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983). According to Mr. Schulz, his

1 standard hourly billing rate for legal work is \$340 per hour; that of his associate,  
2 Farah M. Khaireddin, is \$190 per hour. *Id.* ¶ 5. However, due to his firm's  
3 relationship with Target, the work on this case was billed at "a significantly  
4 discounted rate" of \$170 per hour for Mr. Schulz and \$150 per hour for Ms.  
5 Khaireddin. *Id.* Based on the 25 hours spent by Ms. Khaireddin preparing the  
6 opposition to Plaintiff's motion, and the 3.5 hours spent by Mr. Schulz reviewing the  
7 opposition prior to filing, Target requests an award of \$4,345.00 in attorney's fees.  
8 *Id.* ¶ 6.

9       The Court finds both the hours expended and the hourly rates reasonable.  
10 However, the Court retains discretion to determine the ultimate amount of the award.  
11 *Hensley*, 461 U.S. at 437. Upon due consideration, the Court awards Target  
12 attorney's fees in the amount of \$2,250.00, calculated as 15 hours spent by Ms.  
13 Khaireddin preparing the opposition to Plaintiff's motion at her billing rate of \$150  
14 per hour.<sup>4</sup>

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25       <sup>4</sup> These 15 hours (or approximately 60% of Ms. Khaireddin's time) are  
26 satisfactorily representative of the time expended opposing Plaintiff's motion on the  
27 specific grounds of untimeliness and procedural impropriety. In the event Plaintiff  
28 had filed a timely motion, Ms. Khaireddin would have reasonably expended at least  
10 hours preparing an opposition on other grounds. The time expended by Mr.  
Schulz reviewing Ms. Khaireddin's work would presumably have been similar to the  
amount of time spent under the present circumstances.

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The Clerk of Court shall enter judgment in favor of Target as to all claims and terminate the case.

**DATED:** August 15, 2013

Hon. Michael M. Anello  
United States District Judge